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U.S. DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA — WESTERN DIVISION

UNITED STATES OF AMERICA, EX REL. NYOKA LEE and TALALA MSHUJA,

Plaintiff,

v.

CORINTHIAN COLLEGES INC., et al.,

Defendants.

CASE NO. CV 07-01984 PSG (MANx)

RELATORS' OPPOSITION TO DEFENDANTS' CORINTHIAN COLLEGES, INC.'S ET AL, AND ERNST & YOUNG LLP'S MOTIONS TO DISMISS (DKT NOS. 150 and 154)

Place: Courtroom 880
Judge: Hon. Philip S. Gutierrez
Date: March 11, 2013
Time: 1:30 p.m.

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Pursuant to the Federal Rules of Civil Procedure, Relators Nyoka Lee and Talala Mshuja submit this Relators' Opposition to Defendants' Corinthian Colleges, Inc., David Moore and Jack Massimino's Motion to Dismiss (together "COCO") (Doc. 150), and to Defendant Ernst & Young LLP's Motion to Dismiss ("EY"), set forth below.

BACKGROUND

The issue before the Court is whether COCO's recruiter compensation practices, *as implemented*, were publically disclosed. The operation of COCO's recruiter compensation program, *in practice*, is the critical issue.

> In short, on three recent occasions the Courts of Appeals have reversed the granting of motions to dismiss and have recognized False Claims Act claims for very similar alleged violations of the Incentive Compensation Ban 'as implemented.'

United States ex rel. Washington v. Education Management, 2012 U.S. Dist. LEXIS 67103, *42 (W.D. Penn. 2012). The Ninth Circuit clearly defined the issue in the case to be "Corinthian's implementation of its policy, rather than the written policy itself." *United States v. Corinthian Colleges*, 655 F.3d 984, 996 (9th Cir. 2011). Relators' testimony is that *in practice*, the only factor considered in grading the recruiters' performance was their recruitment numbers, as reflected in the detailed tracking of student enrollment numbers. This detailed tracking of recruiter "Lead-to-

Conversion Ratios" is reflected in the *Ad Rep Performance Flash* reports distributed weekly by COCO's corporate office to the director of admissions at each of the campuses. Relators produced copies of these *Ad Rep Performance Flash* reports, and documents identifying the directors of admissions at other Corinthian campuses who simultaneously received *Ad Rep Performance Flash* reports reflecting the performance of recruiters at that campus. In stark contrast to these *Ad Rep Performance Flash* reports, COCO argues that the Relators were evaluated based on quality factors of which they were completely unaware. The School urges the Court to ignore the Relators' testimony about how their performance was evaluated. The Ninth Circuit warned that attempts to quantify the basic job requirements.

> If the performance rating of at least "Good" requires an employee merely to fulfill basic performance requirements that are expected of any employee (such as showing up on time), then construing the Safe Harbor Provision so that these ratings serve as an independent basis for compensation increases would lead to an "absurd result." Under such a system, educational institutions could entirely circumvent the HEA incentive compensation ban by simply formalizing through a performance rating system, the basic requirements expected of *any* employee, that is, the requirements of employment itself. Allowing the Safe Harbor Provision to shield such a program from HEA's recruiter compensation requirements would render meaningless the "purpose or objective" of the statute.

(footnote and citations omitted).

Congresswoman Waters' Testimony

Defendants first asserted that there has been a "public disclosure" of the allegations in Relators' complaint in the Joint Rule 26 Report. COCO quoted testimony of Congresswoman Maxine Waters where she stated that the recruiter enrollment *quota system* used by Corinthian Colleges violated the Higher Education Act ("HEA") recruiter compensation ban.

> There is no question that the allegations and transactions on which Relators' claims are based were publicly disclosed. For example, before Relators filed their original complaint, the School was publicly accused in a Congressional hearing of allegedly violating the incentive compensation ban.[1] Representative Maxine Waters testified that for-profit colleges applied a "thinly disguised incentive compensation or quota system which violates the spirit and intent of the prohibition on incentive compensation under the Higher Education Act, and specifically identified the School as engaging in this alleged conduct. (Ex. A at 19.) She additionally claimed that alleged financial aid violations at the School's San Jose campus occurred because "admissions representatives were trying to meet their quotas." (*Id.* at 19, 20.)[2]

(Doc. 127, p. 3, Ex. A). COCO argued that Congresswoman Waters' testimony was a public disclosure that would divest the Court of jurisdiction pursuant to 31 U.S.C. § 3730(e)(4)(A) (2007), unless relators were shown to be an "original source" of the allegations in the lawsuit.

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[1] *See* Transcript of March 1, 2005 Hearing on Enforcement of Federal Anti-Fraud Laws in For-Profit Education Before the Committee on Education and the Workforce, U.S. House of Representatives. (footnote in original, Doc. 127, Ex. A, Joint Rule 26 Report)

[2] Similarly, at the same Congressional hearing, a former director of admissions at the School's campus in Reseda, California, spoke of the School's alleged exclusive focus on "mere admission enrollment numbers and quotas." (Ex A at 39.) (footnote in original)

Congresswoman Waters' testimony about enrollment quotas has been categorically foreclosed as a basis of liability in the case. COCO completely disregards the Ninth Circuit's explicit ruling that enrollment quotas do not violate the Higher Education Act ("HEA") recruiter compensation ban as a matter of law. *Corinthian Colleges, id.*, at 992.

Public Knowledge that Fraud was "Endemic" in For-Profit Education

COCO's motion dismiss now asserts that dozens of public disclosures about widespread fraud in the for-profit education industry that predated this action. COCO asserts that there were broad industry-wide reports of recruiter compensation violations in the for-profit education industry. COCO is relying on this broad "endemic" fraud theory of public disclosure, even where the specific culprits are unidentified and the fraudulent practices are undefined. In stark contract, the *Corinthian Colleges* decision explains that the nature of the violation consist of concealing the actual illegal recruiter compensation practices behind documentation that is ostensibly shows practices that are permitted under the HEA.

> "[D]espite the Compensation Program's purported or documented reliance on something other than recruitment numbers, these salary increases are *in practice* determined on the sole basis of recruitment numbers. It is Corinthian's implementation of its policy, rather than the written policy itself, that bears scrutiny under the HEA, and such allegations would require additional discovery."

Corinthian Colleges, id., at 996. (emphasis in original). This analysis was elaborated in *United States ex rel. Washington v. Education Management Corp.*, 2012 U.S. Dist. LEXIS 67103 (W.D. Penn. 2012) ("*Education Management"*), which noted that three recent courts of appeals rulings recognized violations of the incentive compensation ban "as implemented," versus according to the written recruiter compensation program.[3] "This argument fundamentally contradicts Plaintiffs' 'as implemented' theory of the case, which is that even if the paperwork looked correct on its face, such paperwork was only a pretext or cover-up and did not reflect EDMC's real compensation practices." *Education Management, id.*, at *40. In short, the defendant uses c*amouflage* to conceal its actual recruiter compensation practices. "Even though the Plan, on its face, appears to comply with the Safe Harbor, at this stage of the case the Court cannot determine whether or not, in actuality, the 'quality factors' were used merely as a proxy for recruiting success." *Id.*, at *41.

The Notice of Proposed Rulemaking by the Department of Education pointed out the same problem of detection discussed at length in the *Corinthian Colleges* and *Education Management* decisions due to the fact

[3] The three decisions cited by *Education Management* for the proposition that are *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914 (7th Cir. 2005), *United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166 (9th Cir. 2006), and *United States v. Corinthian Colleges*, 655 F.3d 984 (9th Cir. 2011).

that the schools disguised their actual recruiter compensation practices behind a facially valid compensation plan. (*See* COCO's RJN Ex. 19, Doc. 152-19).

> *Adjustments to employee compensation*. The Department explained that this safe harbor has led to allegations in which the institutions concede that their compensation structures include consideration of the number of enrolled students, but aver that they are not *solely* based upon such numbers. In some of these instances, the substantial weight of the evidence has suggested that the other factors purportedly analyzed are not truly considered, and that, in reality, the institution bases salaries exclusively upon the number of students enrolled. For this reason, the Department purposes to delete this safe harbor.

The authorities cited in Defendants' briefs as support for this industry-wide public assertion reflect fraudulent practices that utilize a uniform method and readily observable deception that "enabled the government to readily identify wrongdoers…." *In re Natural Gas Royalties*, 562 F.3d 1032 (10th Cir. 2009) (the public information made it easy for the Government because all it had to do was examine the royalty contracts to determine which drillers were using the fraudulent measurement techniques.). *Natural Gas Royalties, id.,* at 1042.

In contrast, the courts have all concluded that the recruiter compensation practices, *as implemented*, means that the Government would "need to comb through myriad transactions performed by various types of

entities in search of potential fraud." *Natural Gas Royalties, id.,* at 1042-1043. The recruiter compensation practices, *as implemented*, are not readily observable, and did not employ uniform methods.

Courts have cautioned against using industry-wide allegations of fraud to bar *qui tam* actions under the public disclosure bar. The decision in *Cooper v. Blue Cross & Blue Shield of Florida, Inc.*, 19 F.3d 562, 566 (11th Cir. 1994) warned against applying the reasoning behind *Natural Gas Royalties* too broadly. The court noted that barring a relator's suit in that circumstance

> would preclude any *qui tam* suit once widespread – but not universal – fraud in an industry was revealed. The government often knows on a general level that fraud is taking place and that it, and the taxpayers, are losing money. But it has difficulty identifying all of the individual actors engaged in the fraudulent activity. This casting of the net to call all wrongdoers is precisely where the government needs the help of its "private attorneys general."

Id., at 566. Knowledge of industry-wide misconduct rises to the level of a public disclosure only where the United States can file suit against a particular entity based on the information.

> Other courts of appeals have concluded that reports documenting a significant rate of false claims by an industry as a whole -- without attributing fraud to particular firm -- do not prevent a *qui tam* action against any particular member of that industry.

United States ex rel. Baltazar v. Advanced Healthcare, 635 F.3d 866 (7th Cir. 2011). *Baltazar*, explained for instance, that a statement that "half" of a particular industry was engaged in a particular type of fraud would not support a suit against a specific entity.

> A statement such as "half of all chiropractors' claims are bogus" does not reveal *which half* and therefore does not permit suit against any particular medical provider. It takes a provider-by-provider investigation to locate the wrong-doers.

Chief Judge Easterbrook analyzed the FCA pubic disclosure doctrine in terms of how a statute of limitations argument is addressed by a court. If there is insufficient information to trigger the statute of limitations, then the public disclosure bar would not apply.

> This would be clear if the dispute concerned the statute of limitations. No one would contend that the … [government] Reports 'disclosed' any given provider's fraud and thus started the statute of limitations for suit by the United States; only information that a *particular* provider had committed a *particular* fraud would do that. Similarly a report by the SEC revealing widespread securities fraud would not start the time to sue *every* issuer for *every* fraud; again that requires a person-specific disclosure that establishes not only falsity but also intent to deceive, which is an element of fraud.

Baltazar, id., at 867-868, *citing Merck & Co. v. Reynolds*, 130 S.Ct. 1784, 1796, 176 L. Ed. 2d 582 (2010).

The seminal case on the public disclosure bar is *U.S. ex rel. Springfield Terminal Railway v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994). "The

language employed in § 3730(e)(40(A) suggests that Congress sought to prohibit *qui tam* actions *only* when either the allegation of fraud or the critical elements of the fraudulent transaction themselves were in the public domain." *Id.*, at 654.

> In terms of the mathematical illustration, when X by itself is in the public domain, and its presence is essential but not sufficient to suggest fraud, the public fisc only suffers when the whistleblowers suit is banned.

Id. "The relator must possess substantive information about the particular fraud, rather than merely background information…." *Stinson, Lyons, Gerlin & Bustamente, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3d Cir. 1991).

Generic Recruiter Compensation Allegations

Allegations of generic HEA recruiter compensation violations are insufficient to trigger a public disclosure. The general assertion that a school pays incentive compensation to its recruiters does not necessarily state an HEA violation. *Education Management, id.*, at *15-16. "A school may consider a recruiter's success at recruiting student and adjust his/her salary based in part on that success." *Id.*, at *16, *citing* 67 Fed. Reg. at 67,053.

> "Even as broadly construed, the HEA does not prohibit any and all employment-related decisions on the basis of recruitment numbers; it prohibits only a particular type of incentive compensation."

Corinthian Colleges, id., at 992.

***Ad Rep Performance Flash* weekly reports**

The Relators allege that COCO graded and compensation its recruiters based on a calculation of the recruiter's Lead-to-Conversion Ratio. The Lead-to-Conversion Ratios were documented in an *Ad Rep Performance Flash* report distributed weekly by COCO's corporate office to director of admissions at each COCO campus.

COCO's "serial FCA litigation" argument

COCO asserts that at least five (5) other *qui tam* suits have been brought by Relators' counsel that resemble the Complaint in this case. Defendants also make the misleading assertion that the Fifth Circuit cases filed by Relators' counsel were dismissed as being without merit. The Fifth Circuit held that HEA recruiter compensation violations are not actionable under the FCA, a position directly at odds with the Ninth Circuit's decision in *U.S. ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166 (9th Cir. 2006), *cert. den.*, 127 S.Ct. 2099, 167 L. Ed. 2d 813 (2007). First with regard to previous cases filed by Relators' counsel, the United States intervened in one case; the United States filed statements of interest in two of the cases; and, the United States launched a massive criminal investigation under 18 U.S.C. § 1962 *et seq*., the Racketeer Influenced

Corrupt Organizations Act ("RICO") against a defendant sued by Relators' counsel. Moreover, the defendant in *University of Phoenix* filed a petition for writ of certiorari to the U.S. Supreme Court failed in its attempt to overturn the Ninth Circuit on the basis of the Fifth Circuit's decision.

PROCEDURAL SEQUENCE FOR A "PUBLIC DISCLOSURE" ANALYSIS

The procedural sequence for ruling on a public disclosure challenge to jurisdiction in the Ninth Circuit is spelled out in *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1419-1420 (9th Cir. 1991) and *Wang v. FMC Corp*., 975 F.2d 1412, 1416 (9th Cir. 1992). A court may inquire into a relator's original source status *only if* the court first finds that there has been a public disclosure of the allegations or transactions set forth in the FCA lawsuit.

> Wang alleges that FMC defrauded the government in four separate ways. A review of the record makes clear that neither the allegations nor the evidence concerning three of those projects has been publicly disclosed. … Neither the district court nor the parties mentions this fact, and they seem not to understand it implications. Whether or not Wang was the "original source" of the evidence concerning these three projects, the jurisdictional bar of section 3730(e)(4) cannot block Wang's prosecution of them. Where there has been no 'public disclosure' within the meaning of section 3730(e)(4), there is no need for a *qui tam* plaintiff to show that he is the 'original source' of the information. *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1419-1420 (9th Cir. 1991); *see also United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1500 (11th Cir. 1991).

> A *qui tam* plaintiff need prove his status as an "original source" under section 3730(e)(4)(B) "**only if** an exception is sought to the bar of 4(A)." *Hagood*, 929 F.2d at 1420.

Wang v. FMC Corp., 975 F.2d 1412, 1415-1416. *Hagood* is equally adamant that public disclosure is established beforehand; there shall be no "original source" inquiry unless and until a public disclosure has been established.

> There is, of course, no need for Hagood to show that he is "the original source" of the information. That statutory phrase in 31 U.S.C. § 3730(e)(4)(B) comes into play only if an exception is sought to the bar of 4(A). As the bar of 4(A) does not apply, there is no need to invoke the exception.

Hagood, 929 F.2d at 1420. W*ang* and *Hagood* control on the circumstances that require a relator to establish that she is an "original source." The procedural sequence the Defendants have urged in their motions is completely backwards from Ninth Circuit law. *See also, United States ex rel. Biddle v. Board of Trustees of the Leland Stanford, Jr. University*, 161 F.3d 533, 537 (9th Cir. 1998); *United States ex rel. Aflatooni v. Kitsap Physicians Services*, 163 F.3d 516, 524 (9th Cir. 1998).

The Ninth Circuit' two-step procedure for analyzing public disclosure has been adopted in other circuits. The court are required to make a finding on "public disclosure" as a prerequisite to any "original source" inquiry under 31 U.S.C. 3730(e)(4)(A) (2007).

> The 1986 *qui tam* amendments set up a two-part test for determining jurisdiction. First, the reviewing court must ascertain whether the "allegations or transactions" upon which the suit is based were "publicly disclosed" in a "criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit or investigation, or from the news media." 31 U.S.C. 3730(e)(4)(A). **If – and only if – the answer to the first question is affirmative**, *see Wang v. FMC Corp.*, 975 F.2d 1412, 1416 (9th Cir. 1992), will the court then proceed to the "original source" inquiry … .

United States ex rel. Springfield Terminal Railway Co. v. Quinn, 14 F.3d 645, 653 (D.C. Cir. 1993).

In response to direct questioning by the Court, counsel for COCO conceded that without a public disclosure, there is no challenge to the Court's jurisdiction.

> THE COURT: What happens if there's been no -- again, I have not focused on the merits, but what happens if there's no public transaction of the allegations or transaction.
>
> MS. YOUNG: It's true. If there's no public disclosure, then jurisdictional issue does not come into play.[4]

[4] *See*, p. 9:2-8, Reporter's Transcript of Proceedings dated October 29, 2012, attached hereto as Exhibit 1.

ENROLLMENT QUOTAS

Defendants' public disclosure arguments depend entirely on enrollment quotas, a category of allegations that has already been completely eliminated by the Ninth Circuit as grounds for a jurisdictional challenge under 31 U.S.C. § 3730(e)(4). The FCA public disclosure bar is in no way implicated by the fact that the school enforced mandatory enrollment quotas as a condition of employment for its recruiters.

The Ninth Circuit has already eliminated enrollment quotas as a basis for liability in this case. *United States v. Corinthian Colleges*, 655 F.3d 984, 992 (9th Cir. 2011). The Ninth Circuit ruled that enrollment quotas do not violate the Higher Education Act ("HEA") recruiter compensation ban as a matter of law.

1. *Termination based on recruitment numbers*

> [2] Relators allege that employees were "disciplined, demoted, or terminated" on the basis of their recruitment numbers. This does not state a violation of the incentive compensation ban. … Thus adverse employment actions, including termination, on the basis of recruitment numbers remain permissible under the statute's terms. *See U.S. ex rel. Bott v. Silicon Valley Colleges*, 262 F. App'x 810, 812 (9th Cir. 2008). … The Complaint's allegation that Corinthian imposes adverse employment consequences on the basis of recruitment quotas does not, therefore, state a violation of the HEA incentive compensation ban, and also does not state a claim that a false statement was made.

Id. at 992. Enrollment quotas are not fraudulent as a matter of law, and are not a "false statement" within the definition of the False Claims Act ("FCA"). Therefore, mandatory enrollment quotas, targets or goals for recruiters may not be the basis of a "public disclosure" under the FCA.

"Original Source" and the Program Participation Agreements ("PPA")

COCO asserts that Relators do not qualify as original sources because they lack knowledge about the Program Participation Agreements ("PPA") COCO entered into with the Government. The challenge based on the PPA was thoroughly analyzed and refuted in the *University of Phoenix*, where the Ninth Circuit held that statutory conditions for receiving funds from the United States are in the nature of legislative facts. The sequence of the paperwork used to obtain federal funds by fraud is completely immaterial. A "course of conduct" that results in payment by the Government is sufficient to establish FCA liability, even in the absence of paperwork.

> We agree with the Seventh Circuit that "it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork." *Main*, 426 F.3d at 916.[5] All that matters is whether the false statement or course of conduct causes the government to "pay out money or to forfeit moneys due." *Harrison*, 176 F.3d at 788.[6] Relators have properly alleged that the University submitted a claim, for purposes of False Claims Act liability.

[5] *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914 (7th Cir. 2005)
[6] *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999)

United States ex rel. Hendow v. University of Phoenix, 461 F.3d 1166, 1177-1178 (9th Cir. 2006). Accordingly, "a false statement or fraudulent course of conduct" violates the FCA. *Phoenix, id.*, at 1178. As explained in *Phoenix*, the FCA "false certification" theory of liability does not actually require an assertion of compliance by the recipient of government funds.

> An explicit statement, however, is not necessary to make a statutory requirement a condition of payment, and we have never held as much.

Phoenix, *id.,* at 1177. COCO's obligation to comply with government funding conditions arises from the statute itself.

> Therefore, because relators have alleged that the University fraudulently violated a regulation upon which payment is expressly conditioned in three different ways, we hold that they have properly alleged the University engaged in statements or courses of conduct that were material to the government's decision with regard to funding.

Id.

The Incentive Compensation Prohibition Is A "Legislative Fact"

Phoenix defines the HEA incentive compensation prohibition as a legislative fact, *i.e.*, an obligation that arises from law.

> … eligibility of the University under Title IV and the Higher Education Act of 1965 -- and thus, the funding that is associated with such eligibility -- is explicitly conditioned, in three different ways, on compliance with the incentive compensation ban.
>
> First, a federal statute states that in order to be eligible, an institution must enter into a program participation agreement with the Secretary [of Education]. The agreement shall condition the initial and continuing eligibility of an institution to participate in a

> program upon compliance with the following requirements ... [including the incentive compensation ban.]
>
> 20 U.S.C. 1094(a) (emphasis and brackets in original). Second, a federal regulation specifies:
>
> An institution may participate in any Title IV, HEA program ... only if the institution enters into a written program participation agreement with the Secretary .... A program participation agreement conditions the initial and continued participation of an eligible institution in any Title IV, HEA program upon compliance with the provisions of this part [such as the incentive compensation ban.]
>
> 34 C.F.R. 668.14(a)(1) (emphasis and brackets in original). Third and finally, the program participation agreement itself states:
>
> The execution of this Agreement [which contains a reference to the incentive compensation ban] by the Institution and the Secretary is a prerequisite to the Institution's initial or continued participation in any Title IV, HEA program. (emphasis and brackets in original).

Phoenix, *id.* at 1176-1177. The Incentive Compensation Ban is a statutory condition for receiving payment from the Government. The *Phoenix* decision rejected the assertion made by COCO in its motion to dismiss that FCA liability depends on a certain type of certification.

> We note that the University and the district court below have taken our holdings to mean that the word "certification" has some paramount and talismanic significance, apparently believing that a palpably false statement does not bring with it False Claims Act liability, while a palpably false certification will. This facile distinction would make it all too easy for claimants to evade the law. The Fourth Circuit rightly noted that False Claims liability attaches "because of the fraud surrounding the efforts to obtain the contract or benefit status, or the payments thereunder." *Harrison*, 176 F.3d at 788 (emphasis by the Court). That the theory of

> liability is commonly called "false certification" in no indication that "certification" is being used with technical precision, or as a term of art: the theory could just as easily be called the "false statement of compliance with a government regulation that is a precursor to government funding" theory, but that is not as succinct. Furthermore, because the word "certification" does not appear in 31 U.S.C. 3729(a)(1) or (a)(2), there is no sense in parsing it with the close attention typically attending an exercise in statutory interpretation. So long as the statement in question is knowingly false when made, it matters not whether it is a certification, assertion, statement, or secret handshake; False Claims Act liability can attach.

Hendow, *id.,* 461 F.3d at 1172 (quoting *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir. 1999).)

The court in *United States v. Education Management Corporation*, 2012 U.S. Dist. LEXIS 67103 *13-14 (W.D. Penn. May 11, 2012) (*Education Management*) issued a highly relevant decision addressing the distinction between a "factually false" and a "legally false" FCA cause of action in the context of the incentive compensation ban. The *Education Management* decision adopted the Ninth Circuit's reasoning in *Phoenix* and explained the "implied false certification," explaining in relevant part that the obligations imposed by law establish FCA liability:

> A claim is "legally false" when the claimant knowingly falsely certifies that it has complied with a statute or regulation, the compliance with which is a condition of Government payment. There are two types of "legally false" claims. Under the "express false certification" theory, an entity is liable under the FCA for falsely certifying that it is in compliance with regulations that are prerequisites to Government payment in connection with claim for payment of federal funds. Under the broader "implied false certification" theory adopted in *Wilkins*, liability attaches when a claimant seeks and makes a claim for

> payment from the Government without disclosing that it has violated regulations that affect its eligibility for payment. As the *Wilkins* court explained: "Thus, an implied false certification theory of liability is premised on the notion that the act of submitting a claim for reimbursement itself implies compliance with governing federal rules that are a precondition of payment."

Id., at *14 (citing *United States ex rel. Wilkins v. United Health Group*, 659 F.3d 295 (3d Cir. 2011)). Furthermore, it is simply beyond dispute that Corinthian signed and submitted the PPA to the government as the statute and regulation required in order to obtain the Title IV funding, a fact that the Relators are not required to prove under the FCA.

Education Management noted that it was following the ruling of the Seventh Circuit in *United States ex rel. Main v. Oakland City Univ*., 426 F.3d 914 (7th Cir. 2005) ("*Main*") and the rulings of the Ninth Circuit in *U.S. ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166, 1168 (9th Cir. 2006) and *United States v. Corinthian Colleges*, 655 F.3d 984 (9th Cir. 2011).

Defendants' Judicial Admissions Contradict Any Public Disclosure

COCO has made judicial admissions that its recruiter compensation practices have never been publicly disclosed. First, COCO filed suit against the Illinois Attorney General in response to a subpoena requesting documents showing COCO's practices for evaluation compensation for

company recruiters. COCO filed suit against the Illinois Attorney General saying that its recruiter compensation documents were "trade secrets" under Illinois law.[7] Second, in support of its Application for Protective Order (Doc. 177), COCO asserts that the documents produced by Relators were confidential business records that were not previously disclosed. The Application is supported by the Declaration of Roger Van Duinen (No. 177-1), vice-president of marketing, responsible for all Corinthian Colleges, Inc. marketing activities, which says that the *Ad Rep Flash Reports* were part of the "School's confidential business practices …. The School treats these reports as confidential because they include sensitive business information."

> 2. Corinthian Colleges (the "School") has used various reports, some of which I understand have been referred to in this litigation as "Ad Rep Flash Reports," to track admissions activity at the School and monitor employee performance. These reports are generated from proprietary School databases and reflect the School's confidential business processes for encouraging attendance and admitting students, and for tracking and reporting employee performance.
>
> 3. The School treats these reports as confidential because they include sensitive business information about the School's encouraging attendance and enrollment activities that could he harmful in the hands of competitors. These types of documents also reflect business processes the School uses to ensure that its operations are running efficiently, effectively, and in

[7] *See*, *Corinthian Colleges, Inc. v. Illinois Attorney General Lisa Madigan in her official capacity*, No. 12 CH 23872, Circuit Court of Cook County, Illinois, County Department, Chancery Division, attached as Exhibit 2.

> compliance with applicable rules and regulations, all of which give the School a competitive advantage.

The *Ad Rep Flash Reports* show the Lead-to-Conversion Ratios for recruiters employed at Corinthian Colleges. COCO affirmatively asserts that these *Ad Rep Flash Reports* have never before been publicly disclosed. The *Ad Rep Flash Reports* demonstrate that the Defendant compensates its recruiters based solely on their success in securing enrollments in violation of the HEA. Relators filed an ex parte application "[t]o protect the confidentiality of those documents, the School moved for -- and was granted -- an order sealing certain exhibits to its motion."[8] Defendants also represented to the Court that the *Ad Rep Flash Reports* among "the School's confidential and competitively sensitive information," along with other recruiter compensation records produced by Relators have not been publicly disclosed in Defendants Corinthian Colleges, Inc., David Moore, and Jack D. Massimino's Ex Parte Motion For Entry of Protective Order (Doc. 177). Defendants' counsel Blanca F. Young provided her personal Declaration attesting to the non-public nature of the *Ad Rep Flash Reports* and other recruiter compensation documents (Doc. 177-2, Decl. of Blanca F. Young).

[8] *See* The School Defendants' Opposition to Relators' *Ex Parte* Application filed Jan. 29, 2013.

The reasons for requesting a protective order are to keep concealed from the public COCO's recruiter compensation practices.

> The School Defendants requested the Proposed General Protective Order because this lawsuit concerns the School's compensation practices for employees involved in admissions activities at the School, and the School Defendants were concerned about protecting the confidentiality of documents that may be relevant to the case including employee compensation records and personnel files, and the School's proprietary and competitively sensitive documents reflecting how it compensates and tracks performance of its employees. (Id."

Doc. 177, Page 5 of 12, *citing* Young Decl. (Doc. 177-2). These judicial admissions made by Blanca F. Young contradict the entire premise of Defendants' public disclosure argument! There in fact has been no public disclosure the *Ad Rep Performance Flash* reports, which defense counsel has personally admitted to the Court. Defendant Ernst & Young LLP adopted the position taken in the Motion and in Ms. Young's Declaration that the *Ad Rep Performance Flash* reports have not been publicly disclosed and so indicated by filing a Statement of Support of Defendants Corinthian Colleges, Inc., David Moore, And Jack Massimino's Ex Parte Motion For A Protective Order. (Doc. 180). Defendants have made affirmative assertions to the Court that the *Ad Rep Performance Flash* reports have not been placed in the public realm. Defendants are judicially estopped from now

contradicting their assertions regarding the non-disclosure of the *Ad Rep Performance Flash* reports produced by Relators, which have have not been disclosed in the public realm. *United Steelworkers of America v. Retirement Income Plan for Hourly-Rated Employees of, ASARCO*, 512 F.3d 555 (9th Cir. 2008). Moreover, the Court should take judicial notice that of this fact: there has been no public disclosure of *Ad Rep Performance Flash* reports, and these records are not been placed in the public realm. Fed. R. Evid. 201. "Courts may take judicial notice of publications introduced to 'indicate what was in the public realm at the time, not whether the contents of those articles were in fact true.'" *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 960 (9th Cir. 2010).

EY'S OBLIGATION TO DISCLOSE LIABILITY

The Ninth Circuit explicitly held that whether EY had the obligation to report Corinthian's liabilities resulting from potential violations of the Higher Education Act ("HEA") recruiter compensation prohibition was a question of fact, "certainly subject to 'reasonable dispute.'" *United States v. Corinthian Colleges*, 655 F.3d 984 (9th Cir. 2011). The financial statements for Corinthian Colleges, Inc. submitted to the U.S. Department of Education ("DoE") made no mention of Corinthian's HEA-related liability to the

Government. These financial statements were audited and certified by EY, a requirement under the HEA.

> Here, we can consider the *existence of* the reports identified by EY, since the Complaint expressly refers to and 'necessarily relies on' them. Nonetheless, we may not, on the basis of these reports, draw inferences or take notice of facts that might reasonably be disputed. Whether EY is ultimately responsible for certifying Corinthian's compliance with HEA, and whether the Financial Reports they submitted failed accurately to reflect Corinthian's HEA-related liabilities, are open questions requiring further factual development. At the very least, they are certainly subject to 'reasonable dispute.'"

Id. The crux of Relators' FCA claim against EY is that Corinthian had liability to the United States as the result of its violations the HEA recruiter compensation prohibition, and EY failed to report the "HEA-related liabilities" in its audit opinions for these financial statements.

The information provided by Relators to the Government is whether the HEA recruiter compensation violations occurred. There is no requirement that a relator must qualify as an expert witness in auditing as a prerequisite to bringing an FCA claim against an auditor.

Ernst & Young LLP urges this Court to rely on the Fifth Circuit authority in deciding their motions to dismiss. EY makes the following argument in its motion to dismiss (Doc. 154):

> The substantial similarity between the allegations pled against EY in this case and the allegations pled against PwC in the *ITT*

> *Case* is sufficient to trigger the FCA's jurisdictional bar. … But there is more.
>
> Second, the *qui tam* complaint filed against EY in the *Whitman Case*[9] made the following allegations:
>
> . . .
>
> "E&Y made false statements and records, falsely certified, and fraudulently induced the [DoE] by representing that E&Y had audited Whitman's and Ultrasound's financial statements in accordance with GAAS, and that the financial statements were fairly presented in accordance with GAAP." (*Id*. ¶ 63.)

(Doc. 154, at 16-17). The Fifth Circuit forecloses FCA suits for violations the HEA recruiter compensation prohibition. In the Fifth Circuit, an FCA suit cannot be brought for violations of the HEA recruiter compensation ban. *See United States ex rel. Graves v. ITT Educational Services, Inc.,* 284 F. Supp. 2d 487 (S.D. Tex. 2003), *aff'd*, 111 F. App'x 296 (5th Cir. 2004). The Ninth Circuit, in contrast, held in the *University of Phoenix* case that HEA recruiter compensation violations can be asserted under the FCA. Therefore, Fifth Circuit law does not allow an FCA for violations of the HEA recruiter compensation prohibition, while the Ninth Circuit allows FCA suits based on violations of the recruiter compensation prohibition. This split between the Fifth and Ninth Circuit is clearly defined in the petition for writ of certiorari filed in the *University of Phoenix* case.

[9] The *Whitman* case was voluntarily stayed in the district court without a ruling on any issue.

> *Graves* therefore bars a litigant in the Fifth Circuit from bringing an FCA claim that, under the decision below, would be viable in the Ninth Circuit.

University of Phoenix, Petitioner, v. United States ex rel. Mary Hendow and Julie Albertson, Respondents, Pet. For Writ of Cert., 2006 U.S. Briefs 248760; 2007 U.S. S. Ct. Briefs LEXIS 972.

EY argues that the Relators cannot be an original source since they have no knowledge of the professional standards for conducting audits. This issue is whether EY had an obligation to disclose HEA-related liabilities based on the recruiter compensation violations reported by the Relators. It cites no authority in support of this position. Moreover, EY's relies mainly on *In re Natural Gas Royalties*, 562 F.3d 1032 (10th Cir. 2009) to support its public disclosure argument. No industry-wide disclosure is shown.

EY attempts to ride on the back of the public disclosure arguments asserted by COCO. EY's audit and reporting obligations are not implicated under any of the public disclosure theories advanced by Defendants. EY's gatekeeper role as auditor is a separate and independent issue. EY argues public disclosure based on cases filed more than ten (10) years ago that never ruled on the auditor's liability under the FCA. A public disclosure about one defendant affords no protection to another defendant. *Wang v. FMC Corp*., 975 F.2d 1412 (9th Cir. 1992). EY's violations have never been

publicly disclosed. *See United States ex rel. Aflatooni v. Kitsap Physician Services,* 163 F.3d 516, 523 (9th Cir. 1998) (fraud was alleged "against two distinct groups of defendants." Following *Wang, id.* at 1415-1416, the Ninth Circuit reversed the public disclosure finding as to the second group of defendants: "[W]e find that the district court erred in concluding that the public disclosure bar applied to all Defendants…."

***Education Management* ruling on HEA recruiter compensation violation**

Education Management rejected the same attempt to minimize the Relators in a case against a for-profit education company that the Defendants have done in their briefs in this case. *Education Management* involved parallel attacks on the Relators. The Defendants in *Education Management* challenged the Relators knowledge on the following grounds:[10]

1. Relators have limited knowledge, *i.e.,* Relators have no knowledge before June 2004 or after June 2007;

[10] "EDMC further notes that the Relators have limited knowledge. For example, there are no allegations regarding conduct prior to June 2004 or after June 2007. In addition, Neither Washington nor Mahoney had responsibility for evaluating ADAs or making compensation decisions or had access to the factors actually used to pay ADAs. EDMC points out that the Relators did not work at each individual school named as a Defendant nor did they participate in the certifications made to the governments. EDMC also contends that Plaintiffs have failed to identify the conduct of each separately named Defendant. Moreover, EDMC argues that the Complaints fail to adequately plead the scienter element in that the Complaint fails to allege facts regarding EDMC's knowledge at the time the Plan was drafted and implemented and does not link the persons who signed the PPA's and/or certifications to the alleged compensation violations."
Education Management, id., at *43-44.

2. Relators had no responsibility for evaluating recruiters or making compensation decisions, or had access to the factors actually used to pay recruiters;

3. Relators did not work at each individual school named in the complaint;

4. Relators did not participate in the certifications, *i.e.*, the Program Participation Agreements;

5. Relators failed to identify the conduct of each Defendant named separately;

6. Relators fail to allege the state of mind of the Company at the time the recruiter compensation program was drafted; and,

7. Relators do not link the persons who executed the Program Participation Agreement to the compensation violations.

Education Management rejected the identical argument COCO makes that the relator can only allege violations for the campus where he was employed. There is no need to detail the conduct of each school because the schools are related corporate entities.

> "Because Plaintiffs' theory is that there was one, EDMC-wide scheme controlled by top-level executives, it is not necessary to allege separate conduct by each of the affiliated schools named as Defendants."

Education Management, id., at *54. Similarly, *Education Management* broadly rejected the challenge that relators were required to know about the Program Participation Agreement ("PPA") with the Government, or the identify of the persons who executed the PPA, *i.e.*, Relators did "not link the

persons who signed the PPA's and/or certifications to the alleged compensation violations." *Education Management, id*., at *43-44. The implementation of the fraudulent recruiter compensation plan was done "top-down, company-wide." *Id.*, at *50.

> "Moreover, the *Science Applications* Court recognized that the definition of 'knowingly' in the False Claims Act was intended 'to capture the ostrich-like conduct which can occur in large corporations where corporate officers insulate themselves from knowledge of false claims submitted by lower-level subordinates.'" *Education Management, id.,* at p. *52, *citing United States v. Science Applications Intl. Corp.*, 626 F.3d 1257, 1275 (D.C. Cir. 2010).

Securities Class Action Complaint is based on Enrollment Quotas

There is no merit to COCO's assertion that a public disclosure resulted from the allegations of recruiter compensation violations made in *In re Corinthian Colls. Inc. Shareholder Litig*., No. 04-cv-5025 (C.D. Cal.), *appealed sub nom. Metzler Inv. GMbh v. Corinthian Colls., Inc.*, No. 06-55826 (9th Cir). The factual assertions beneath the allegations of recruiter compensation violations were that recruiters were forced to meet enrollment *quotas, targets* and *goals*. As discussed above, recruiter enrollment quotas do not violate the HEA incentive compensation ban as a matter of law under the Ninth Circuit decision in this case. Set forth are multiple allegations of recruiter compensation violations from the Corinthian shareholder litigation.

¶180. Another former employee, CW5, a Senior Admissions Representative at GMI in Atlanta, Georgia, who was there through the first part of the Class Period, described the admissions process as "entirely sales." It was about the "bottom line," not what was best for the student. According to the witness, the **quota** for each admission representative at GMI was 20 students per month, which the witness stated was a difficult number to meet. As with other campuses, pressure was intense on the representatives, who were "always on 30 days notice," which meant, if you missed your **quota** and failed to bring it up in 30 days, you would be terminated.

¶186. CW25, a former Senior Financial Aid Representative at Everest College in Dallas, Texas until early 2004 further stated that, in order to meet **quotas** imposed by management, financial aid representatives improperly processed prospective students who were already in default on loans.

¶198. In June 2004, Corinthian finally disclosed to the public that the DOE's review of its school in San Jose found violations of federal funding rules, but despite firing two people, the Company asserted that the agency review did not uncover fraud. A former financial aid officer who worked at the school at the time, however, said that several employees were engaging in fraud in order to meet their enrollment **quotas** and maximize the amount of Title IV funding the school received. Specifically, a former financial aid officer, CW35 who worked at the San Jose campus of Bryman College for several years until near the end of the Class Period, said an admissions officer, who was attempting to meet his enrollment **quotas**, told students that he could get them "free money" through the federal loan program if they signed up for classes at the school. …

¶228. CW25, a Senior Financial Aid Representative at Everest College in Dallas, Texas during most of the Class Period, said bonuses were given to schools, individual department heads and individual representatives in both the admissions and financial aid departments who met their **quotas**, in violation of the HEA's prohibition against incentive compensation.

¶231. A former Financial Aid Officer at the San Francisco campus of Bryman College until mid-2004, CW32, admitted that Directors of Admissions, Directors of Financial Aid and School Presidents received quarterly bonuses contingent upon meeting **target** numbers set by corporate and, therefore, had incentive to cheat.

¶232. C13, a Senior Admissions Representative at the Port Orchard, Washington campus of Bryman College for a year and a half until April 2004, stated that, although admissions representatives in CW13's department did not get commissions for meeting **quotas**, hitting **target** numbers was a condition of employment and determined whether a representative would receive the annual raise of 20% or not.

¶235. Former Corinthian employees throughout the United States confirmed that defendants set unrealistic goals for enrollment, retention and placement and exerted enormous pressure on employees at each Corinthian school to meet these **targets**.

¶237. CW25 further confirmed that admission representatives were regularly threatened with termination and some were terminated for failing to meet recruiting **quotas**. However, numerous former employees at various schools stated that the **quotas** were unreasonably high and unreachable without using questionable or fraudulent practices. For example, supervisors directed them to do whatever was necessary to get students enrolled and packaged in order to meet **quotas.** As a result, CW25 and other financial aid representatives improperly processed prospective students who were already in default on loans.

¶238. Other former employees related similar pressure to sign up students to boost enrollment for Corinthian. A former Financial Aid Director at Everest College in California through early 2004, CW7, described it as an "admissions driven" school that was under constant pressure from headquarters to start as many students as possible each enrollment period in order to impress the corporation's shareholders. "It was all about the

numbers and the bottom line; how many starts we could report to shareholders and how much money we were making." In fact, the witness admitted the school was under so much pressure to meet its admission **quotas** that admission officers often talked students into enrolling in school before they wanted to do so. They needed to get every person they could to agree to start the program. "If a student sat in a classroom for fifteen minutes, it was counted as a 'start.'" *CW7 estimated that 10% of the students who started each quarter should not have been counted as "starts." By January 2004, according to CW7, the campus had 600 files for students whose financial aid packages had not been properly processed.* CW7 was knowledgeable about such facts because, as Financial Aid Director, CW7 was responsible for processing student aid applications, Title IV funding administration and ensuring that federal and state guidelines for both enrollment and financial aid eligibility are met.

¶239. A former Director of Admissions at the El Monte, California campus of the Bryman College, CWI4, stated that during his/her tenure from 1999-2002, the corporate officers set admissions **goals** as part of the budgeting process and expected them to start 100 new students every month. They had "very, very lofty **goals**," CWl4 said. "It was all about putting the numbers up on the board ... we had to make our numbers. [The Regional Manager] said to do whatever it takes to get the job done." One means used to "get the job done" was to have students sit in class for a day or two so they could be counted as starts, even though they were not legitimate students and would drop out shortly after starting. CW14 estimated at least 12 students each quarter were improperly counted as starts. Another 6-12 students each quarter were admitted although they didn't pass their admissions tests. The examinations would be conveniently "lost" by admission representatives so the students could still be admitted. From all accounts, this is typical of the culture that continued throughout the Class Period.

¶241. Likewise, a former Senior Admissions Representative at Corinthian's Kee Business College in Virginia, CW37, portrayed the immense pressure to meet monthly **quotas**, or

face termination, that existed during CW37' s three-year tenure at the Company. CW37 stated that, in order to meet the department's monthly quotas, each of the five admissions representatives had to enroll at least five students every week. "We had to make those numbers no matter what," CW37 said. If a representative failed to meet the monthly enrollment **quota**, then he or she was put on a performance improvement plan or "PIP." If the employee failed to meet their **quota** the following month, he or she would be terminated. The pressure was so great to meet the Company-mandated **quota** that the college even admitted students who had severe disabilities *(i.e.* students who were legally blind, schizophrenic, or suffering from severe scoliosis) which prevented them from performing in the fields for which they were studying. CW37 was intimately knowledgeable of such facts since CW37 was directly involved in student recruitment and enrollment and was, thus, subject to the **quotas**. In fact, CW37's yearly raises were based on whether CW37 met his/her enrollment **goals**. CW37 was also responsible for sending weekly flash reports to corporate managers summarizing whether CW37 and the four other members of the admission office at the Kee Business College in Newport News, Virginia had met their enrollment **quota**. During CW37's tenure, he/she saw colleagues lose their jobs for failing to make their enrollment **quotas** and witnessed at least one suffer illness from the pressure to meet the **quotas**. Although CW37 left the school in June 2003, CW37's experience was shared by employees at other schools during the Class Period.

¶245. At another Bryman campus located in another state, CW13, who was a Senior Admissions Representative during most of the Class Period, was required to enroll three students per week or be terminated. "Enrollments" were measured by the number of "sits" or the student's presence in a classroom, regardless of whether they were fully admitted or would subsequently be reversed. Hitting **target** numbers was a condition of employment. Although CW13 left employment with Corinthian before the end of the Class Period, CW13 remains in contact with friends who still work there who tell CW13 the enrollment **quotas** are now seven per week for each

representative, which they say is unrealistic for the school and region and unachievable by legitimate means.

¶247. The threat of termination for failing to meet enrollment **quotas** was described by nearly every former employee encountered in plaintiffs' investigation who had responsibility for admissions. In another example, the former Director of Admissions at Bryman College, CW29, was responsible for admissions representatives who each had to enroll a minimum number of students each month or lose their job. Between August and November 2004, during CW29's first months with the Company, the School President fired six admissions representatives for not meeting their **quota**. CW29 was given a budget requiring a certain number of admissions per month and told to enroll "anyone" who came in the door including prospective students with criminal records - even though they would never be able to get a job in their selected field, such as for medical assistants, because of their criminal record.

¶250. The undue pressure to meet admissions **quotas** was not limited to the Bryman schools. An Admissions Representative who was responsible for recruiting and enrolling prospective students at Las Vegas College for part of the Class Period, CW4, describes a tyrannical approach to requiring employees to meet unrealistic **quotas**. The Director of Admissions "wouldn't let us leave until we had met our **quota.**" CW4 and fellow representatives were forced to work on Saturdays to meet their **quotas**. "We had to enroll anyone" in order to meet the **targets**. *According to CW* 4, *"false starts" (students not fully processed),"were continuous," and accounted for about 50% of "enrollments.* "By way of illustration, CW4 explained that in a typical class of 20 enrolled students, maybe 15 would go to at least a couple of classes while five would never show up at all. Within the first week, five of the 15 who showed up originally would stop attending. So, of the original20, maybe 10 (or 50%) would actually be legitimate enrollments. The others would be reversed or dropped.

¶353. According to former Corinthian employees, defendants actively monitored and tracked the progress of each Corinthian

school in reaching "sales **quotas**" (emollment), and retention figures (among other benchmarks)

Enrollment quotas do not violate the HEA recruiter compensation ban as a matter of law. *Corinthian Colleges, id.*, at 992. This is a rehash of the public disclosure argument COCO makes Congresswoman Maxine Waters, which is directly at odds with the Ninth Circuit's decision. The securities class action complaint statements are the same: that "hitting target numbers was a condition of employment …," and that "quarterly bonuses [were] contingent upon meeting target numbers set by corporate …." COCO motion at 9-10 (Doc. 150). Enrollment quotas, goals and targets are perfectly legal.

OTHER "RED HERRING" AND "DIVERSIONARY" ARGUMENTS

1 COCO's motion relies extensively on *Devlin v. California*, 84 F.3d 358 (9th Cir. 1996) in support of its original source argument. *Devlin* was not brought by the employee who observed the fraud take place while working for the company, but by a third-party with no connection to the company who learned of the fraud from the employee actually observed it. Nyoka Lee and Talala Mshuja both worked in the admissions department of COCO, and they have direct fist-hand knowledge of the violations.

2 COCO asserts that Relators did not provide information to the Government before suit was filed. Relators provided a draft

complaint together with attachments to the U.S. Attorney on October 11, 2006, five months before suit was filed. In the event the Court reaches the original source question, the draft complaint will be provided for *in camera* review by the Court.

3 Oral argument was held in the U.S. Court of Appeals for the Seventh Circuit in *U.S. ex rel. Leveski v. ITT Educ. Servs. Inc.,*, No. 12-1369, on January 17, 2013. The decision in *Education Management* involved circumstances similar to the case at hand, and relies on Ninth Circuit law. *Leveski* wrongly decided under Ninth Circuit law.

AFFIDAVIT OF RELATOR NYOKA JUNE

The Affidavit of Nyoka June Lee is attached and incorporated hereto for all purposes. Nyoka Lee and Talala Mshuja are model relators. Together they were worked at Corinthian Colleges, Inc. for over a dozen years. Nyoka Lee provided extensive business records of the recruiter compensation practices of the Defendant. Ms. Lee worked as a recruiter in the admissions department. Ms. Lee has firsthand, direct, and independent knowledge of the recruiter compensation practices engaged in by her employer. Mr. Mshuja was a test proctor whose job function placed in a direct working relationship with the recruiters in the admissions department.

He made direct and independent observation of the recruiters throughout the years of his employment. He has direct and independent knowledge of the job requirements of the recruiters he worked with every day.

Ms. Lee testified repeatedly in deposition that she was evaluated based entirely on her "numbers." 54:3 – 54:23; 81:10 – 83:15; 90:13; 94:13; 127:2 – 130:18; 140:12 – 142:22. *See* Deposition excerpts of Nyoka Lee, attached as Exhibit 3. Ms. Lee also testified that the admissions directors were also paid based entirely on the number of enrollments. 150:14.

MOTION FOR CONTINUANCE UNDER RULE 56(D)

Relators in the instant lawsuit are entitled to obtain the discovery necessary to fully respond the motions to dismiss filed by Corinthian Colleges, Inc. and by Ernst & Young LLP under Fed. R. Civ. P. 56(d). During the October 29, 2012 hearing, the Court instructed Relators to file a Rule 56(d) request for continuance to obtain discovery after the Defendants filed their motions to dismiss.[11] In accordance with the Court's directions, Relators make this application for a continuance to obtain the discovery needed to respond to the respective motions to dismiss filed by Defendants (Doc. 150 and 154). Pursuant to the Federal Rules of Civil Procedure 56(d),

[11] *See*, Reporter's Transcript of Proceedings dated October 29, 2012, attached hereto as Exhibit 1.

Relators seek a continuance to obtain the *Ad Rep Performance Flash* for each campus of Corinthian Colleges, Inc. for the time periods relevant to this lawsuit, until 2010, for all 100 campuses of defendant Corinthian Colleges, Inc. This evidence will help corroborate Ms. Lee's assertions that all 100 campuses received a weekly *Ad Rep Performance Flash* that graded recruiters according to their Lead-to-Conversion Ratios. Moreover, these *Ad Rep Performance Flash* reports continue to be routinely distributed through the present.

Relators request one-hundred twenty (120) days to obtain the Ad Rep Performance Flash Reports for all 100 Corinthian campuses from 2000 through 2010. This evidence is necessary for Relators to respond to the motions to dismiss for lack of jurisdiction filed respectively by Corinthian Colleges, Inc. *et al*. (Doc. 150) and by Ernst & Young, LLP (Doc. 154).

The Motion to Dismiss filed by Corinthian Colleges, Inc. (Doc. 150) was adopted and incorporated into the Motion To Dismiss filed by Defendant Ernst & Young (Doc. 154), and therefore a complete response to EY's motion necessarily includes the response to the motion of Defendant Corinthian Colleges, Inc.

Relators should be allowed to discover the *Ad Rep Performance Flash* reports of all 100 Corinthian Colleges' campuses. Defendants assert that the

Relators cannot be the "original source" of the practices that occurred (a) after Relator Nyoka Lee's employment terminated in 2005, and (b) at campuses other than the campus where Relators were employed. The weekly *Ad Rep Performance Flash* reports for the period 2000-2012 will corroborate Ms. Lee's testimony that all of the campuses of Corinthian Colleges, Inc. graded their recruiters based on the L-C Ratios, and that this practice continued after Ms. Lee's employment was concluded in 2005. Mr. Mshuja's employment ended in 2009. Where the fraudulent practices commence during Relators' employment, they can still establish "direct and independent" knowledge of the fraud.

> All of these instances of alleged conduct occurring after the Relator's departure involve conduct that began during his employment and continued after his departure. Therefore, as the "information underlying the claim" commenced during Relator's employment, he is not prevented from establishing "direct and independent knowledge" solely because the conduct continued after his departure.

United States ex rel. Smith v. Yale Univ., 415 F. Supp. 2d 58, 74 (D. Conn. 2006).

Relators herein are entitled to discovery of this evidence under Rule 56(d). Fed. R. Civ. P. 56(d) provides:

> (d) WHEN FACTS ARE UNAVAILABLE TO NONMOVANT. If a non-movant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

> (1) defer considering the motion or deny it;
>
> (2) allow time to obtain affidavits or declarations or to take discovery; or
>
> (3) issue an other appropriate order.

Relators are entitled to a continuance under Rule 56(d) to obtain the *Ad Rep Performance Flash* for each campus of Corinthian Colleges, Inc. for the time periods relevant to this lawsuit, and ediscovery relating to these reports. This evidence exists and was disclosed by Relator Nyoka Lee in her deposition given on December 17, 2012.

Since the Court's order for Phase I Discovery (Doc. 131) allowed only the Defendants to obtain written and deposition discovery from Relators to determine of the Relators had direct and independent knowledge of the events and transactions alleged in the suit, discovery by Relators has been completely stayed by operation of Rule 16. The Defendants have now filed their motions to dismiss challenging the Court's jurisdiction over the lawsuit. Motions for summary judgment should not be considered until the non-movant has an opportunity to obtain relevant discovery.[12] *Employers Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Clorox Co.*, 353 F.3d 1125, 1129-30 (9th Cir. 2004). The additional time will enable Relators

[12] In the Joint Rule 26 Report, Defendants point out that their jurisdictional motions are for summary judgment, made under Fed. R. Civ. P. 56. (Doc. 127, at pp. 9-10).

to rebut movants' allegations challenging Relators' direct and independent knowledge that every campus of Corinthian Colleges, Inc. received a weekly *Ad Rep Performance Flash* report showing the Lead-to-Conversion Ratio ("L-C Ratio") for every recruiter employed at the campus. Relator Nyoka Lee produced several *Ad Rep Performance Flash* reports for the period she was employed through 2005, for the campuses where she worked.

This Rule 56(d) motion is supported by the Declaration of Scott D. Levy, which is incorporated by reference.

Dated: February 8, 2013

Respectfully submitted:

LEVY & ASSOCIATES PC

By: _____// SDL //_____

SCOTT D. LEVY
Attorney for Relators Nyoka June Lee and Talala Mshuja